Supreme Court, U.S.
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No. 05-1000

In The
Supreme Court of the United States

ALAN D. GORDON, M.D.; ALAN D. GORDON, M.D., P.C., A CORPORATION; MIFFLIN COUNTY COMMUNITY SURGICAL CENTER, INC., A CORPORATION,

Petitioners,

v.

LEWISTOWN HOSPITAL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. **HCQIA**. Whether a hospital that engages in anticompetitive conduct is entitled to immunity under the Health Care Quality Improvement Act whenever it believes that its anticompetitive conduct will further quality health care or protect patients.

2. **Hospital-Physician Agreements**. Whether a contract prohibiting truthful, competitively important information, imposed by a hospital on a physician, is entitled to the same deferential antitrust scrutiny as a non-price vertical agreement between a manufacturer and reseller, even though hospitals and physicians do not stand in a vertical relationship and hospitals are not effective surrogates protecting consumer interests.

3. **Potential Competition**. Whether an agreement between two potential competitors may be considered horizontal, subject to enhanced antitrust scrutiny, even though one of the potential competitors has not yet commenced operations.

RULE 29.6 STATEMENT

Petitioners state that they have no parent or subsidiary corporation and that no publicly held company holds any stock of a Petitioner.

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OPINIONS BELOW

The district court issued three opinions on appeal here:

- First, an opinion dated May 21, 2001, that, in pertinent part, denied the Plaintiffs' motion for summary judgment on its claim under Section One of the Sherman Act. *Gordon v. Lewistown Hospital*, 2001 WL 34373013 (M.D. Pa. May 21, 2001), reproduced at App 167-232;
- Second, an opinion on reconsideration of the March 21, 2001 order, dated August 15, 2001, granting the Hospital's motion for summary judgment allowing it immunity, reproduced at App 233-48; and
- Third, an opinion entering judgment for the Defendant after a bench trial. *Gordon v. Lewistown Hospital*, 272 F. Supp.2d 393 (M.D. Pa. 2003), reproduced at App 53-166.

The Third Circuit Court of Appeals' opinion affirming the district court judgments is found at *Gordon v. Lewistown Hospital*, 423 F.3d 184 (3d Cir. 2005), and is reproduced at App 1-52.

JURISDICTION

The Third Circuit's judgment was entered on September 13, 2005. A timely petition for rehearing was filed, and was denied on November 7, 2005. App. 249-50. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of the Health Care Quality Improvement Act, 42 U.S.C. §11151(9), and the Sherman

Act, 15 U.S.C. §1, are included in the appendix at App 251-52.

STATEMENT

A. Introduction.

Petitioners ask this Court to define the type of antitrust scrutiny a court should apply to efforts by hospitals to limit competition among physicians and to prevent competition by a competing facility. The Third Circuit labeled the relationship between a hospital and an independent physician as "vertical," and thus held that any agreement between a hospital and a physician is always subject to review only under a full-blown rule of reason analysis. The relationship between a hospital and a physician, however, is quite different from a traditional vertical relationship between a manufacturer and a reseller. Hospitals and physicians provide different but complementary services to patients. Consequently, hospitals are not neutral with respect to which physician patients choose, and their interests are not necessarily aligned with consumers. This relationship is further complicated by the fact that physicians are increasingly entering into direct competition with hospitals by opening facilities, such as free-standing surgical centers, specialty hospitals and imaging centers.

The Third Circuit granted immunity from antitrust damage claims for any restraint a hospital imposes on a physician, regardless of its anticompetitive nature, and regardless of whether the hospital's conduct is otherwise exempted from the immunity statute, so long as a hospital asserts that its action benefits patients.

With respect to the Sherman Act claim, the Third Circuit was confronted with an agreement between a hospital and a physician that kept critical competitive information from consumers. The Third Circuit, with no

analysis or explanation, erroneously declared that the agreement was a non-price vertical restraint subject to very deferential antitrust scrutiny.

Further, the Third Circuit erred in deeming the restraint vertical, given that the Hospital viewed Dr. Gordon as a potential competitor because he was close to opening a competing surgical facility. Thus, regardless of the nature of the hospital-physician relationship, the agreement between the Hospital and Dr. Gordon was horizontal.

B. Undisputed Factual Background.

1. Competition Among Ophthalmic Surgeons.

The Plaintiffs include not only a physician, Dr. Alan Gordon, but also the surgical facility he now owns and was developing during the events at issue here. The defendant Lewistown Hospital is the only hospital in Mifflin and Juniata counties in Pennsylvania (App at 3), with a dominant market share in a concentrated market. Much of this case is about the Hospital's effort to maintain its dominant position.

There are only two ophthalmologists in Mifflin and Juniata counties, Dr. Gordon and Dr. Paul Nancollas. App at 4. Dr. Gordon is "widely respected as a surgeon," whose "medical competence is not at issue in this case." App at 58. Unlike Dr. Nancollas, Dr. Gordon is certified by the American Board of Eye Surgeons. *Id.* Dr. Gordon used the more modern phacoemulsification ("phaco") procedure to remove cataracts, which became "the preferred procedure for ophthalmologists" by the mid-1990s. App at 59-60. In contrast, Dr. Nancollas used the older "ECCE" procedure to remove cataracts. App at 4-5. The phaco procedure has a shorter recovery time and "less risk of complications" than the ECCE procedure. App at 5. Dr. Gordon's phaco